UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL A.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. 2:19-CV-1352 – DWC

ORDER REVERSING AND REMANDING DEFENDANT'S DECISION TO DENY BENEFITS

Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of Defendant's denial of Plaintiff's applications for disability insurance benefits ("DIB") and supplemental security income ("SSI"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 2.

After considering the record, the Court concludes the Administrative Law Judge ("ALJ") erred when she improperly discounted the joint opinion of ARNP Sonia Nikolova and Dr. James Hopfenbeck. The ALJ's error is therefore harmful, and this matter is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Commissioner of the Social Security Administration ("Commissioner") for further proceedings consistent with this Order.

FACTUAL AND PROCEDURAL HISTORY

On September 30, 2016, Plaintiff filed applications for DIB and SSI, alleging disability as of February 1, 2015. *See* Dkt. 8, Administrative Record ("AR") 17. The applications were denied upon initial administrative review and on reconsideration. *See* AR 17. A hearing was held before ALJ Stephanie Martz on July 6, 2018. *See* AR 17. In a decision dated October 10, 2018, the ALJ determined Plaintiff to be not disabled. *See* AR 33. Plaintiff's request for review of the ALJ's decision was denied by the Appeals Council, making the ALJ's decision the final decision of the Commissioner.[1] *See* AR 16; 20 C.F.R. § 404.981, § 416.1481.

In the Opening Brief, Plaintiff maintains the ALJ erred by improperly: (1) considering the medical opinion evidence; and (2) finding Plaintiff's unspecified intellectual disability as non-severe at Step Two. Dkt. 10. Plaintiff requests the Court remand his claims for an award of benefits. Dkt. 10, p. 18.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

[1] Plaintiff previously filed applications for DIB and SSI in 2013. *See* AR 17. The ALJ issued a decision finding Plaintiff not disabled, and Plaintiff appealed the decision. *See* AR 17. In June 2017, this Court affirmed the ALJ's decision. *See* AR 149. The prior ALJ decision created a presumption of continuing non-disability regarding the applications at issue here, but the ALJ found Plaintiff met his burden of rebutting that presumption by providing new evidence showing he has a new severe impairment of asthma. AR 17. The ALJ also noted that because the Commissioner has changed the criteria for determining disability based on mental impairments since the issuance of the prior decision, a reassessment of Plaintiff's mental health under the new listing was necessary. AR 17. Thus, this Court will review the ALJ's October 2018 decision.

DISCUSSION

I. Whether the ALJ properly considered the medical opinion evidence.

Plaintiff asserts the ALJ improperly dismissed the opinions of Ms. Nikolova and Drs. James Czysz and Hopfenbeck. Dkt. 10, pp. 9-18.

In assessing an acceptable medical source, an ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988). When a treating or examining physician's opinion is contradicted, the opinion can be rejected "for specific and legitimate reasons that are supported by substantial evidence in the record." *Lester*, 81 F.3d at 830-831 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). The ALJ can accomplish this by "setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)). "Other medical source" testimony "is competent evidence that an ALJ must take into account," unless the ALJ "expressly determines to disregard such testimony and gives reasons germane to each witness for doing so." *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001); *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1224 (9th Cir. 2010). "Further, the reasons 'germane to each witness' must be specific." *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009).

The ALJ made two analyses of these medical opinions. First, she considered Ms. Nikolova's April 2015 opinion together with Dr. Czysz's May 2017 opinion, who both completed psychological evaluation forms for the Washington State Department of Social and

Health Services ("DSHS") *See* AR 29-30. Next, she discussed Ms. Nikolova's and Dr. Hopfenbeck's joint opinion from December 2016. *See* AR 30-31.

A. Ms. Nikolova's 2015 and Dr. Czysz's 2017 opinions

Ms. Nikolova conducted a psychological evaluation of Plaintiff and completed a DSHS form in April 2015. AR 362-365. Dr. Czysz completed a psychological evaluation of Plaintiff and filled out a DSHS form in May 2017. AR 530-534. Both Ms. Nikolova and Dr. Czysz conducted clinical interviews and a mental status exam of Plaintiff and made diagnoses. AR 363-365, 530-534. The limitations they opined to were similar but not identical. For example, while Ms. Nikolova opined Plaintiff was severely limited in completing a normal work day and work week without interruptions from psychologically based symptoms, Dr. Czysz opined Plaintiff was markedly limited in the same category. AR 364, 532. Both opined Plaintiff was markedly limited in his ability to ask simple questions or request assistance, communicate and perform effectively in a work setting, and maintain appropriate behavior in a work setting. AR 364, 532. Ms. Nikolova listed Plaintiff's diagnoses as depressive disorder, PTSD, and cognitive disorder. AR 363. Dr. Czysz diagnosed Plaintiff with major depressive disorder, anxiety, and unspecified intellectual disability. AR 531.

The ALJ discussed these opinions and gave them little weight, because:

> (1) They relied heavily on the claimant's subjective reported symptoms and limitations even though there are good reasons for questioning the reliability of his subjective complaints. It is clear from their statements in the form that the information was based on the claimant's self-reports as well as his behavior during the evaluations and upon his self-reports. However, there is reason to believe the claimant's statements were not reflective of his actual abilities or functioning. Particularly, the claimant had made statements to Nurse Nikolova and Dr. Czysz that are not consistent with his statements found other [sic] records.
>
> i. The claimant's statements to them that he was in special education are not consistent with his own answer on the disability report that he had not attend [sic] any special education classes; and

> ii. He told both Nurse Nikolova and Dr. Czysz that he stopped working in 1999 after a head injury in a car accident that worsened his intellectual deficits. However, his earnings record shows that he continued to work for years after 1999 until 2013, and earned above substantial gainful activity level in many of those years. These inconsistencies show that the claimant had misrepresented facts in order to increase his chance of getting benefits. They also suggests [sic] that Nurse Nikolova and Dr. Czysz might have formed their opinions depending on some misleading information.
>
> (2) As discussed above, I note that Nurse Nikolova diagnosed cognitive disorder and Dr. Czysz diagnosed unspecified intellectual disability. However, the record does not contain any evidence of traumatic brain injury. Further, I give little weight to the diagnosed unspecified intellectual disability, as discussed above.
>
> (3) Nurse Nikolova's opined marked to severe limits are not consistent with her own description of the claimant during the examination that he showed regular speech, good mood, only slightly anxious affect, and slightly distractible concentration and some issues but not extremely impaired memory.
>
> (4) The opinions of Nurse Nikolova and Dr. Czysz are also inconsistent with the claimant's longitudinal treatment history, his performance at appointments, his own statements about improvement, and his documented daily and social activities. While the record does show that the claimant exhibited some aggressive behavior at times, the record as a whole does not show ongoing conflicts as he testified. Further, the record documented that the claimant denied depression in many occasions and stated that his symptoms improved with medications. Contrary to the opined marked to severe social and cognitive deficits, the claimant regularly shows focused concentration, and said he often takes care of his own hygiene, cleans, watches television, manages his own money, goes to church and bible study, and talks to his sister and mother on the phone.

AR 29-30 (citations omitted).

The Court finds the ALJ's fourth reason for discounting these opinions is specific and legitimate and supported by substantial evidence. The ALJ discounted these opinions based on inconsistency with the longitudinal treatment history, Plaintiff's performance at appointments, Plaintiff's own statements about improvement, and that his medication effectively controls his mental health symptoms.

"Impairments that can be controlled effectively with medication are not disabling for the purpose of determining eligibility for [disability] benefits." *Warre v. Comm'r of the SSA*, 439 F.3d 1001, 1006 (9th Cir. 2006). As the ALJ referenced in her decision, the record contains evidence that Plaintiff's mental health symptoms are under control when he complies with his treatment plan. For example, Plaintiff said that he does not worry much and "maybe the medication is helping with mood." AR 495. Plaintiff said he is "noticing a difference with fluoxetine" and that he "feel[s] lighter." AR 462. He endorsed an improved mood and energy level while on his medication. AR 462. Treatment notes from September 2014 indicate Plaintiff "continues to endorse improvement in symptoms of depression…" AR 463. Plaintiff noted his medication was working "fine" and denied any side effects. AR 497. In October 2015, Plaintiff indicated his "medication continues to be helpful and denies any side effects." AR 501.

Further, other substantial evidence in the record supports the ALJ's conclusion that Plaintiff's medication benefits his symptoms. For example, Plaintiff's treatment providers and examiners observed at multiple places in the record that Plaintiff was calm, cooperative, polite, pleasant, engaged, joyful, or had appropriate interactive behavior. *See* AR 365, 462, 469, 476, 501, 503, 508, 510, 514, 525, 528, 533, 543, 553, 564, 601, 646, 667, 681. Thus, the ALJ's reason for discounting Ms. Nikolova's and Dr. Czysz's opinions because Plaintiff's mental health symptoms are effectively controlled by medication is specific and legitimate.

While the ALJ had three other reasons to discount these opinions, the Court need not consider whether any of the other three reasons contained error, as any error would be harmless because the ALJ gave a specific, legitimate reason supported by substantial evidence to discount the opinions. *See* AR 27, 29-30; *Presley-Carrillo v. Berryhill*, 692 F. Appx. 941, 944-45 (9th Cir. 2017) (citing *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th

Cir. 2008) (noting that although an ALJ erred with regard to one reason he gave to discount a medical source, "this error was harmless because the ALJ gave a reason supported by the record" to discount the source). Accordingly, the Court finds the ALJ properly discounted Ms. Nikolova's 2015 and Dr. Czysz's 2017 opinions.

B. Ms. Nikolova's and Dr. Hopfenbeck's 2016 joint opinion

In December 2016, Ms. Nikolova and Dr. Hopfenbeck provided a letter in support of Plaintiff's SSI application opining Plaintiff experiences negative mental health symptoms which affect his mood and memory. AR 529. They opined Plaintiff's cognitive functioning is significantly impaired, and that Plaintiff would not be able to understand and carry out even simple work instructions related to an employment. AR 529. They also opined Plaintiff's anxiety, depressed mood, and poor concentration would affect his ability to carry out and complete work-related tasks. AR 529. Finally, they concluded Plaintiff would not be able to be employed 8 hours a day, 5 days a week for 52 weeks a year. AR 529.

The ALJ discussed Ms. their joint opinion and dismissed it, saying:

> I give no weight to their opinion here because they relied their opinions on a recent memory test where the claimant scored only 16/30, which is much lower than the normal range [which] begins at 26. Yet, this test result is not consistent with the records [sic] as a whole. First, while the claimant presented with some impaired memory, the treatment notes do not contain any discussion of any memory problem. Further, the one-time memory test result mentioned by Nurse Nikolova and Dr. Hopfenbeck is not consistent with the claimant's presentations at other appointments where he repeatedly exhibited focused concentration.

AR 30-31 (citations omitted).

The ALJ dismissed Ms. Nikolova's and Dr. Hopfenbeck's joint opinion because it relies on a memory test where Plaintiff scored poorly, which the ALJ stated is inconsistent with the record as a whole. AR 31. This reasoning falls short of specific and legitimate. First, the opinion does not indicate that either Ms. Nikolova or Dr. Hopfenbeck relied solely on the

memory test or to what extent they relied on the test. Second, the Court has not found any evidence in the record undermining the validity or applicability of the test results. Thus, the ALJ's statement that Plaintiff's score "is much lower than the normal range" is unconnected to an objective standard and therefore does not support his conclusion. *See* SSR 86-8, 1986 SSR LEXIS 15 at *22 (an ALJ may not speculate). Third, although the record does not contain *discussion* of Plaintiff's memory impairment, there is evidence which indicates Plaintiff has limitations with memory. For example, Plaintiff was unable to recall zero out of three words after a brief delay and failed to recall any recent news events or perform serial 7's or serial 3's. AR 531, 533-534. Thus, the record contains evidence which supports the joint opinion. Fourth, the ALJ failed to explain how Plaintiff demonstrating focused concentration at several appointments conflicts with their conclusions regarding Plaintiff's memory impairment. *See Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003) ("We require the ALJ to build an accurate and logical bridge from the evidence to [his] conclusions so that we may afford the claimant meaningful review of the [Social Security Administration's] ultimate findings").

Thus, the Court finds the ALJ failed to provide specific and legitimate reasons supported by substantial evidence for discounting Ms. Nikolova's and Dr. Hopfenbeck's joint opinion. Accordingly, the ALJ erred.

"[H]armless error principles apply in the Social Security context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the claimant or "inconsequential" to the ALJ's "ultimate nondisability determination." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674 F.3d at 1115. The determination as to whether an error is harmless requires a "case-specific application of judgment" by the reviewing court, based on an examination of the record made

"'without regard to errors' that do not affect the parties' 'substantial rights.'" *Molina*, 674 F.3d at 1118-1119 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

Had the ALJ given great weight to Ms. Nikolova's and Dr. Hopfenbeck's joint opinion, the ALJ may have included additional limitations in the residual functional capacity ("RFC"). For example, they opined Plaintiff would not be able to be employed 8 hours a day, 5 days a week for 52 weeks a year. AR 529. In contrast, in the RFC, the ALJ did not include any absenteeism limitations. *See* AR 24. Therefore, if their opinion was given great weight and additional limitations were included in the RFC and in the hypothetical questions posed to the vocational expert, the ultimate disability determination may have changed. Therefore, the ALJ's errors are not harmless and require reversal. Accordingly, the ALJ is directed to reassess Ms. Nikolova's and Dr. Hopfenbeck's joint opinion on remand.

II. Whether the ALJ erred at Step Two of the sequential evaluation.

Plaintiff maintains that the ALJ erred by finding that his intellectual disability was a non-severe impairment at Step Two of the sequential evaluation. Dkt. 10, pp. 2-9. Because the ALJ's reconsideration of the medical opinion evidence may impact the Step Two analysis and the RFC assessment and because Plaintiff will be able to present new evidence and testimony on remand, the ALJ shall re-consider Step Two of the sequential evaluation on remand.

For the reasons discussed in this Order, the Court finds, on remand, the ALJ must re-evaluate Step Two of the sequential evaluation process and the joint opinion of Ms. Nikolova and Dr. Hopfenbeck. The ALJ is also directed to re-evaluate the remaining steps of the sequential evaluation process as necessitated by further consideration of Step Two and Ms. Nikolova and Dr. Hopfenbeck's joint opinion.

III. Whether this cased should be remanded for an award of benefits.

Plaintiff argues this matter should be remanded with a direction to award benefits. *See* Dkt. 10, p. 18. The Court may remand a case "either for additional evidence and findings or to award benefits." *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the Court reverses an ALJ's decision, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit created a "test for determining when evidence should be credited and an immediate award of benefits directed[.]" *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000). Specifically, benefits should be awarded where:

> (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the claimant's] evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

Smolen, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

On remand, the Court has directed the ALJ to re-evaluate Step Two of the sequential evaluation process, the joint opinion of Ms. Nikolova and Dr. Hopfenbeck, and the remaining steps of the sequential evaluation process as needed. For these reasons, the Court finds there are outstanding issues that must be resolved concerning Plaintiff's functional capabilities and his ability to perform other jobs existing in significant numbers in the national economy. Therefore, remand for further administrative proceedings is appropriate.

CONCLUSION

Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and this matter is remanded for further administrative proceedings in accordance with the findings contained herein.

Dated this 18th day of May, 2020.

David W. Christel
United States Magistrate Judge